United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-2130

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2130

JOE STEVENSON SADDLER,
Appellant,

—*against*—

UNITED STATES OF AMERICA,
Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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2

TABLE OF CONTENTS

TABLE OF CASES

PAGE

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Preliminary Statement

Joe Stevenson Saddler appeals from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*) entered on December 20, 1974, which order denied, without an evidentiary hearing, appellant's motion, pursuant to Title 28, United States Code, Section 2255, to vacate and set aside his judgment of conviction and for leave to plead anew. On December 14, 1972, appellant had entered a plea of guilty to Count One of indictment 72 CR 718. This count charged appellant and three co-defendants with bank robbery, in violation of Title 18, United States Code, Sections 2113(a) and 2. On February 16, 1973, appellant was sentenced to a term of 12 years in prison pursuant to Title 18, United States Code, Section 4208(a)(2). After sentence was imposed, two other counts of the indictment, charging appellant with armed bank robbery and conspiracy, were dismissed on motion of the United States. Appellant is presently incarcerated and serving his sentence at the Federal Penitentiary in Atlanta, Georgia.

Appellant's *pro se* 2255 motion was filed in the District Court on April 3, 1974. In support of his motion, appellant alleged that when he pleaded guilty he was mentally incompetent and that, accordingly, the plea was not made "voluntarily and intelligently." (Appellant's App., Ex 6, page 4). Appellant requested a hearing with respect to his claims. In response, the Government moved to have petitioner examined under Title 18, United States Code, Section 4241,[1] in order to determine his present mental condition and his mental condition at the time of his plea and his sentencing. (Appellant's App., Ex. 8). The Government argued, alternatively, that the 2255 motion should be denied because appellant's guilty plea had been properly taken in accordance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. (Appellant's App., Ex. 11). On December 20, 1974 Judge Costantino issued a Memorandum and Order in which he denied appellant's motion, as well as the Government's request for a 4241 examination. On October 8, 1975, this Court granted appellant's motion for leave to appeal in *forma pauperis* and for the appointment of counsel.[2]

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[1] This statute provides, inter alia, that each Federal penal and correctional institution shall have "a board of examiners", which board

> shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.

Under Title 18, United States Code, Section 4245, the Director of the Bureau of Prisons is required to notify the District Court in which the prisoner was originally convicted whenever there is probable cause to believe, based upon a 4241 examination, that the prisoner was mentally incompetent at the time of his trial, "provided the issue of mental competency was not raised and determined before or during said trial." Under Section 4245, the District Court must then hold a hearing "to determine the mental competency of the accused in accordance with the provisions of Section 4244 . . . , and with all the powers granted therein."

[2] After appellant had filed his pro se motion, Judge Costantino appointed counsel to represent him. Following the denial of the 2255 motion, counsel filed a timely notice of appeal. This appeal was never prosecuted, however, and on October 8, 1975 this Court appointed new counsel to represent appellant for the appeal.

On appeal, appellant challenges the denial of his motion for relief on several grounds. First, it is alleged that the District Court, when it accepted the plea of guilty, failed to make sufficient inquiry into the voluntariness of the plea, in accordance with the requirements of Rule 11. In this connection, appellant claims that he was denied due process when the District Court did not conduct psychiatric inquiry into his condition. Appellant also claims that Judge Costantino improperly denied an evidentiary hearing in the 2255 proceeding in the District Court. Finally, appellant asks this Court to vacate the original plea of guilty, rather than attempting to have a determination of his competency on December 14, 1972. Failing that, appellant contends that the proceedings in any remand to the District Court for a competency determination should begin with a determination by that Court as to whether or not there can in fact be such a retrospective finding. On appeal, appellant explicitly takes no position on the propriety of Judge Costantino's denial of the Government's request for an examination under Section 4241.

Statement of Facts

Petitioner was arrested on June 10, 1972 in connection with the armed robbery, on June 7, 1972 of a branch of Manufacturers Hanover Trust Company located at 84 Broadway, Brooklyn, New York. On June 20, 1972, a three count indictment was filed in the Eastern District of New York (72 CR 718) charging appellant and three co-defendants with conspiracy (Title 18, United States Code, Section 371) and substantive violations of Title 18, United States Code, Sections 2113(a), 2113(d) and 2 arising out of the aforementioned robbery. The case was assigned to Judge Costantino. Appellant initially pleaded not guilty. However, on December 14, 1972, after a suppression hearing had been held and a jury selected,

appellant withdrew his plea of not guilty and was permitted to plead guilty to Count One of the indictment (Title 18, United States Code, Sections 2113(a) and (2) in satisfaction of the other two counts in the indictment. Judge Costantino accepted the guilty plea, and on February 16, 1973 he sentenced appellant as indicated above.[3]

The core of appellant's argument in the District Court in support of the 2255 motion was that at the time he pleaded guilty on December 14, 1972 he was not mentally competent. In this regard, appellant contended that the question of his mental competency was "interposed" at the time of the guilty plea. This contention was apparently based on the fact that after Judge Costantino had finished conducting the Rule 11 inquiry and had accepted appellant's guilty plea, appellant's lawyer requested an examination, under Title 18, United States Code, Section 4244, into appellant's narcotic and psychiatric background. Counsel specifically stated, however, that this examination was being requested "[i]n aid of sentence." (Appellant's App., Ex. 4, page 389). Furthermore, at no time, did appellant or his counsel state that appellant was

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[3] Also pleading guilty on December 14, 1972 were two of appellant's co-defendants, Robert Lee Biggs and Robert Triggs. Like appellant, defendant Biggs pleaded guilty to Count One and was sentenced by Judge Costantino, on February 16, 1973, to 12 years imprisonment, pursuant to Title 18, United States Code, Section 4208(a)(2). Defendant Triggs pleaded guilty to Count Two (armed bank robbery), and on February 16, 1973 Judge Costantino sentenced him to 15 years imprisonment, also under Title 18, United States Code, Section 4208(a)(2). Subsequently, on motion of the Government, charges were dismissed against the fourth defendant, an individual who was a fugitive and who was known only by his last name ("Williams").

[4] On prior occasions, the issue of appellant's medical condition had been raised.

As previously indicated, appellant's plea of guilty was entered following a suppression hearing and the selection of a jury. The suppression hearing began on December 1, 1972. On that day,

[Footnote continued on following page]

incompetent to plead guilty.[4] (Appellant's App., Ex. 4). In reply, Judge Costantino stated that he had "no objection" to such an examination and that he would "permit" it. (Appellant's App., Ex. 4, page 390). The judge then directed counsel to prepare and submit an appropriate order for the examination. The order was never submitted, however, and the examination did not take place.

At sentencing on February 16, 1973, appellant's counsel—a different attorney from the one who had represented appellant when he pleaded guilty—stated that based upon the probation report[5] and an evaluation of appellant's "background" he was requesting a "4208(b) . . . commitment."[6] When questioned by Judge Costantino, counsel responded that appellant had "a history of attempts at suicide." Counsel also stated that he was in receipt of a letter from Knickerbocker Hospital indicating that appellant had "some very grave emotional problems [stemming] from his childhood." Counsel also referred to appellant's drug addiction problem and stated that he had been unable that morning to communicate with his client, who, he said, was unresponsive and "spoke in an incoherent way." (Gov. App., pages A-44, A-45). At no time, however, did counsel raise the question of appellant's competency at the time of the guilty plea.[7]

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counsel for appellant stated that his client was ill and requested an adjournment of the hearing. Following a colloquy with counsel and after questioning appellant, Judge Costantino denied the request. The hearing was continued on December 11, 1972. On December 11, appellant's counsel requested appellant's medical records from the Federal Detention Headquarters on West Street. However, there is nothing in the record to indicate whether or not these records were provided. The transcript does show, though, that on the afternoon of December 11 a medical report was turned over to the Court by the Assistant United States Attorney prosecuting the case.

[5] Copy of which will be provided to each member of the panel which will hear the case.

[6] Title 18, United States Code, Section 4208(b).

[7] Appellant's actions at the time of sentencing are belied by the rational and coherent letter which he sent to Judge Costantino just over one month later (Gov. App., page A-47).

In reply, Judge Costantino stated that he did not feel that appellant was a candidate for a 4208(b) commitment. The judge then asked appellant if he had anything to say in his own behalf. When no meaningful response was forthcoming, the Court pronounced the 12 year sentence under Section 4208(a)(2) (Gov. App., pages A-45, A-46).

ARGUMENT

The order below should be vacated and the case remanded to the District Court for a determination of whether or not appellant was mentally competent to plead guilty on December 14, 1972, such determination to be preceded by a psychiatric examination under Title 18, United States Code, Section 4241, to determine appellant's present mental condition and his mental condition on December 14, 1972, the day he pleaded guilty, and February 16, 1973, the day he was sentenced.

Appellant argued in the District Court, and continues to do so on appeal, that in his case the requirements of Rule 11 were violated when Judge Costantino failed to conduct a sufficient inquiry into the voluntariness of his guilty plea. This inquiry should have been triggered, it is contended, by "appellant's significant history of mental illness, suicide attempts and drug abuse" (Appellant's brief, page 1), coupled with counsel's request—after the guilty plea had been accepted—for a 4244 examination "[i]n aid of sentence." In support of his claims appellant also points to what transpired at his sentencing. He cites, in particular, the contents of the probation report, as well as his unresponsive demeanor and the request of his counsel for a commitment under Section 4208(b).

The test in a case such as this is whether the trial court had before it evidence sufficient to raise a "bona fide and reasonable doubt" as to the defendant's competency to plead guilty. *Grissom* v. *Wainwright*, 494 F.2d 30, 31-32 (5th Cir. 1974), citing *Pate* v. *Robinson*, 383 U.S. 375 (1966). It is the Government's position that on December 14, 1972 Judge Costantino, in appellant's case, did not have before him such a quantum of evidence. Furthermore, as we will show, there were significant reasons for the judge to conclude that appellant was in fact pleading guilty voluntarily and that he was competent to do so. However, while we submit that appellant's guilty plea was properly taken in accordance with the requirements of Rule 11, we do believe that at the time of sentencing it would have been the better course for Judge Costantino to have granted counsel's request for study and report under Section 4208(b) as an aid in sentencing. The judge, in effect, had already agreed to this on December 14, when appellant pleaded guilty. More significantly, though, we adopt this view in light of the information contained in the probation report, appellant's behavior at the time of sentencing and defense counsel's request for such an examination. Cf. *United States* v. *Polisi*, 514 F.2d 977 (2d Cir. 1975).

Now, on appeal, we take again the same position which we did in the District Court. That position is that the first order of business in this case should be a psychiatric examination to determine appellant's competency at all relevant times in these proceedings (namely, the present, the time of his guilty plea on December 14, 1972 and the date of his sentencing on February 16, 1973), followed by a hearing on the question of competency. There has never in this case been an examination to aid in determining appellant's competency. Absent such an examination and the results thereof, there is hardly enough evidence in the record to support the conclusion that the December 14, 1972 plea was improperly taken and that the conviction arising therefrom should be vacated. Furthermore, in light of the claims which have

been made by appellant, it is imperative that the District Court have the benefit of such an examination for use in all future proceedings before it in this case.

A. The December 14, 1972 Guilty Plea

It is clear that when appellant pleaded guilty, Judge Costantino did not have before him evidence sufficient to raise a "bona fide and reasonable doubt" as to appellant's competency. For this reason it was hardly error on the judge's part to fail to inquire any further than he did into the question of voluntariness. Indeed, appellant's guilty plea was accepted in full compliance with the requirements of Rule 11.

The foregoing conclusion becomes inescapable when one considers, by an objective standard, see *Grissom* v. *Wainwright*, *supra*, 494 F.2d at 32, the relevant factors before Judge Costantino on December 14, 1972. To begin with there was, on the one hand, the knowledge of the Court that at earlier stages of the proceedings appellant had complained to his attorney of illness and had stated that he was under medication. Also, the Court was no doubt aware, based chiefly upon testimony at the suppression hearing, that appellant had been addicted to narcotics at the time of the bank robbery. As the courts have observed, however, narcotics use does not *per se* render a defendant incompetent to plead guilty, see *United States ex rel. Fitzgerald* v. *La Vallee*, 461 F.2d 601, 602 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972). *Williams* v. *United States*, 500 F.2d 42, 44 (5th Cir. 1974), especially where, as here, defendant displayed no signs of drug addiction, and neither he nor his counsel stated that he was then under the influence of narcotic or prescription drugs. Cf. *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970). In addition, appellant's testimony in the suppression hearing on December 13, 1972 was lucid, coherent and rational. (Gov. App., page A-1). There is

simply no indication from the record that appellant was under the influence of medication or narcotics. Certainly then, at the time of the guilty plea, Judge Costantino had no reason to believe that appellant was incompetent on account of either physical illness and any related treatment, or drug addiction.

Thus, appellant's only support for his claim of incompetency rests in the contention that at the time he pleaded guilty he was suffering from a mental disability separate and apart from drug addiction or physical illness. Any such claim, however, must fail on the present state of the record in this case. When he accepted appellant's guilty plea on December 14, 1972, Judge Costantino had before him virtually no evidence to cause "bona fide and reasonable doubt" as to appellant's competency.

In support of his claim, appellant places substantial reliance on the fact that after he had pleaded guilty, his attorney requested a 4244 examination prior to sentencing. This request, it is alleged, had the effect of interposing the question of appellant's competency and should have caused the Court to reopen the Rule 11 inquiry and/or to order a psychiatric examination *sua sponte*. Although this argument carries with it a certain superficial appeal, it ultimately fails. It does so, because in reality counsel's request did *not* interpose the question of competency. It did not do so for two reasons. First, the examination requested was sought, specifically, as an aid to sentence. And second, this request aside, there was nothing else before the Court to indicate that appellant was not competent to plead. In fact, as demonstrated above, there was, in Judge Costantino's observation of appellant—in particular his testimony in the suppression hearing—significant evidence pointing towards competency. Furthermore, in the course of the Rule 11 inquiry just completed appellant himself had stated that he was pleading guilty voluntarily and of his own free will, and at no

time did his attorney either state or suggest that he was not competent to plead guilty.

The analysis above finds support in the cases. In *Drope* v. *Missouri*, 420 U.S. 162 (1975) the Supreme Court stated, at 180:

> The import of our decision in *Pate* v. *Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

Applying this standard to appellant's case, it is clear that there was neither one single factor nor a combination of factors which should have compelled Judge Costantino to conclude that there were grounds for believing that appellant was not competent to plead guilty. To begin with, the Court had before it no prior medical opinion on appellant's competence to stand trial. Moreover, appellant's demeanor and testimony during the suppression hearing and his statements during the Rule 11 inquiry hardly indicate irrational behavior. Cf. *Lee* v. *Wiman*, 280 F.2d 257, 265 (5th Cir.), *cert. denied*, 364 U.S. 886 (1960); *United States* v. *Vowteras*, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1975).[8]

Furthermore, appellant was at all times in this case represented by counsel. This fact is important, for this

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[8] In his Memorandum and Order of December 20, 1974 Judge Costantino found that in the suppression hearing, both on direct and cross-examination, appellant had "answered questions clearly and coherently." (Appellant's App., Ex. 3, page 4). This Court has recognized the importance of the observations of the trial judge in determining the question of a defendant's competency. See *United States* v. *Vowteras, supra.*

Court has stated that "[t]he opinion of a defendant's attorney as to his ability to understand the nature of the proceedings and to cooperate in the preparation of his defense is indeed significant and probative." *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972). Here, experienced defense counsel at no time indicated to Judge Costantino that he felt appellant was incompetent to plead guilty. Indeed, from the fact that the Legal Aid Society attorney specifically stated that he was requesting the examination "[i]n aid of sentence,"[9] it was reasonable for the Court to conclude that counsel had considered the question of appellant's competency to plead guilty and saw no need to raise the point prior to the taking of the plea. Cf. *United States* v. *Hall*, 523 F.2d 665 (2d Cir. 1975). Finally, it can hardly be argued that even though counsel specifically stated that he was seeking a *pre-sentence* examination, Judge Costantino, as a result of the request, still should have inquired more fully into the voluntariness of appellant's guilty plea. The fact that counsel wished to have a narcotic and psychiatric background report prior to sentencing did not, when considered along with the other factors before the Court, provide enough objective evidence to trigger further Rule 11 inquiry. Cf. *United States ex rel. Martinez* v. *Thomas*, — F.2d —, Slip Opinion 927, 933-934 (2d Cir. December 8, 1975). Furthermore, it has often been recognized that, as is the case with drug use, the presence of mental illness does not, *per se*, mean that a person is incompetent to stand trial. *Lebron* v. *United*

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[9] We realize that counsel referred to Section 4244 of Title 18 (competency to stand trial), rather than Section 4208(b) (study and report in aid of sentencing) in making his request. What is important, though, rather than the mere citation of the statute, is the fact that from his words and the context in which they were spoken it is clear that counsel was asking for a pre-sentence examination, rather than an examination to determine competency to stand trial or to plead guilty.

States, 229 F.2d 16, 18 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 974 (1956); *Butler* v. *United States*, 384 F.2d 522, 523 (8th Cir. 1967), *cert. denied*, 391 U.S. 952 (1968); *United States* v. *Wheeler*, 404 F.2d 252, 254 (8th Cir. 1968).[10]

Indeed, it is plain that appellant's plea of guilty on December 14, 1972 was accepted in full compliance with the requirements of Rule 11. Upon being advised that appellant wished to withdraw his plea of not guilty, Judge Costantino at once personally addressed him. After carefully advising appellant of his right to consult with counsel and his right to a jury trial, the judge specifically asked appellant if he was making the plea voluntarily and of his own free will. Appellant replied in the affirmative. (Appellant's App., Ex. 4, page 383). The judge then

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[10] Appellant cites numerous cases in support of the proposition that where there is evidence creating reasonable grounds to believe that a defendant is incompetent, a court must inquire and make a determination as to competency before proceeding to trial or accepting a guilty plea.

With this principle, we could hardly argue. We submit, however, that the decisions cited in appellant's brief are all based on facts which make them markedly distinguishable from the instant case. In each of those cases there was present the quantum of evidence which is required to trigger inquiry into the question of competency. As demonstrated above, Judge Costantino did not have before him such evidence when he accepted appellant's guilty plea. See, for example: *Pate* v. *Robinson*, *supra*, 383 U.S. 375 (four witnesses spoke of defendant's disturbed behavior, and defense counsel raised competency issue at time of trial); *Dusky* v. *United States*, 362 U.S. 402 (1960) (recent psychiatric opinion that defendant incompetent to stand trial); *Tillery* v. *Eyman*, 492 F.2d 1056 (9th Cir. 1974) (defendant exhibited erratic and irrational behavior and screamed in jail cell each night); *United States* v. *Kincaid*, 362 F.2d 939 (4th Cir. 1966) (no proper Rule 11 inquiry made, defendant unrepresented by counsel and said he needed treatment); *United States* v. *Makris*, 483 F.2d 1082 (5th Cir. 1973) (prior to trial psychiatric examination sought by the Government revealed that the defendant was not functioning properly under stress).

established, through questioning of appellant, what role appellant had played in the bank robbery, following which the judge explained to appellant the maximum penalty which he could receive and that the Court was making "absolutely no promise" as to the sentence which would be given. (Appellant's App., Ex. 4, pages 383-385). An examination of the record shows that appellant stated that he understood what he was being told and, further, compels the conclusion that he was acting voluntarily with an understanding of the nature of the charge against him and the consequences of his plea.[11]

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[11] To be distinguished is *Irizarry* v. *United States*, 508 F.2d 960 (2d Cir. 1974). Unlike appellant, who admitted his guilt to bank robbery, the defendant in *Irizarry* pleaded guilty to the far more complex crime of conspiracy. In reversing the conviction, the Court held that the District Court had not adequately explained to Irizarry the nature of the conspiracy charge and that the record did not satisfactorily show a factual basis for the plea.

Although Judge Costantino did not, when addressing appellant, specifically explain to him the nature of the charge to which he was pleading, it defies logic and common sense to argue that appellant did not in fact understand the offense with which he was charged. In the first place, when asked to explain his criminal conduct, he admitted to acts clearly prohibited by Title 18, United States Code, Section 2113(a). In addition, as noted above and as Judge Costantino stated on the record at the time, the guilty plea was offered after a jury had been selected and a suppression hearing held, during all of which appellant was present, thus affording him further opportunity to acquaint himself with the charges against him.

In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Supreme Court held that if the trial court accepts a defendant's guilty plea without fully adhearing to the procedure set forth in Rule 11, the defendant is entitled to plead anew. In the *McCarthy* decision the Court noted, however, that the Rule 11 inquiry "must necessarily vary from case to case" and that it was not establishing "any general guidelines other than those expressed in the Rule itself." *McCarthy* v. *United States, supra*, n. 20 at pages 467-468. Clearly, what is important with respect to Rule 11 is that instead of the court following an exact ritual there be "substantial com-

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B. The Proper Remedy on Remand

As we have already stated, it is our view that Judge Costantino should have sentenced appellant initially under Section 4208(b) of Title 18, for study and report, rather than under Section 4208(a)(2). Now, as also previously indicated, we are requesting that the case be remanded to the District Court for a determination of appellant's present competency and his mental condition on December 14, 1972 and February 16, 1973. We are also asking that such determination commence with a psychiatric examination of appellant. We realize that the remedy suggested by the Government seeks a retrospective determination of appellant's mental state at a date over three years ago. However, we have no difficulty in urging this course upon the Court, believing, as we do, that it finds support in both judicial precedent and the facts of the case.

The Government recognizes, at the outset, those cases where the courts have declined to attempt retrospective

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pliance" with the Rule. *Sappington* v. *United States*, 468 F.2d 1378 (8th Cir., 1972), *cert. denied*, 411 U.S. 970 (1973).

Moreover, leaving the question of competency aside, we submit that any deficiency which there may have been in the Rule 11 inquiry in this case was inconsequential. As such, it could not properly be the subject of a 2255 motion. Support for this position is found in the case of *Gates* v. *United States*, 515 F.2d 73 (7th Cir. 1975). There, the Court of Appeals for the Seventh Circuit determined, at 515 F.2d 76-77, that

> Relief is available under § 2255 only if the petitioner demonstrates that the error of the trial court is jurisdictional or constitutional, *Hill* v. *United States*, 368 U.S. 424, 428 (1962), or an error of law which is "a fundamental defect which inherently results in a complete miscarriage of justice" and which presents "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." [citing *Davis* v. *United States*, 417 U.S. 333, 346 (1975)].

determinations of competency. See, for example, *Pate* v. *Robinson, supra*, 383 U.S. 375; *Dusky* v. *United States, supra*, 362 U.S. 402; *Sullivan* v. *United States*, 205 F. Supp. 545 (S.D.N.Y. 1962). However, where the facts have required such action, the courts have sanctioned retrospective determinations of mental competency. In *Conner* v. *Wingo*, 429 F.2d 630 (6th Cir. 1970), the Sixth Circuit affirmed a District Court decision dismissing the petition of a Kentucky prisoner seeking a writ of habeas corpus. In dismissing the petition, the District Court had relied in part upon the results of a psychiatric examination conducted six years after the date of the petitioner's trial. In this connection, the Court of Appeals stated, at pages 639-640:

> We recognize, of course, that the Supreme Court has emphasized "the difficulty of retrospectively determining an accused's competence to stand trial." Obviously, psychiatric evidence based on examination six years after trial has very limited probative value as to competence at the trial. [citing *Pate* v. *Robinson, supra* and *Dusky* v. *United States, supra.*] But appellant seemingly would have us regard this admonition as a flat bar to any retrospective judicial determination at delayed postconviction hearings concerning competency at trial. If such a bar proscribed any postconviction findings of competence at trial, it would constitute an automatic retrial opportunity for any convicted prisoner. If this admonition barred a postconviction judicial determination of either competency at trial or incompetency at trial, it would, of course, serve to defeat any postconviction review of a prisoner's claim that he had been tried while incompetent or improperly deprived of a trial determination on that issue.

In *Miranda* v. *United States*, 458 F.2d 1179 (2d Cir. 1972), this Court upheld a determination of competency

based upon a hearing held over two years after the date in question. The appellant in that case, relying upon *Dusky* v. *United States*, *supra*, and *Pate* v. *Robinson*, *supra*, argued that such a retrospective determination was invalid and that he should be permitted to withdraw his previously entered plea of guilty and to proceed anew. The Court rejected this contention and distinguished *Dusky* and *Pate* from the case before it:

> Each case involved strong showings of the basis for the alleged incompetency, and little or no credible contemporaneous evidence of competency existed. Here, even assuming that a factual basis for the claim has been shown, the record discloses sufficient contemporaneous evidence of competency from which a determination of the competency question can be made. It would be fanciful to suggest that a properly timed claim of incompetency necessitates either a new trial or allowing an earlier guilty plea to be withdrawn. *Conner* v. *Wingo* [citation omitted].

458 F. at 1182.

The authority of *Conner* and *Miranda* is clearly relevant to the disposition of this case. In the first place, it can hardly be said that what transpired at the time of appellant's guilty plea and at his sentencing provides a "strong showing . . . of the basis for the alleged incompetency." Indeed, as demonstrated above, there is considerable "contemporaneous evidence of competency." Moreover, it is to be remembered that in his 2255 motion in the District Court, filed, it is to be noted, over a year after his guilty plea, cf. *Crail* v. *United States*, 430 F.2d 459 (10th Cir. 1970), appellant failed to present any new factual material to support the claim that he was mentally incompetent at the time he pleaded guilty. See *Bruce* v. *Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1973).

While at this time there may be evidence sufficient to present a fact issue as to appellant's past mental condition, we believe that that evidence falls far short of establishing his incompetency as a matter of law. The crucial point is that there has never been an adjudication that appellant was, at any of the relevant times, or even now, mentally ill. Furthermore, there has never been such a quantum of evidence, before either the District Court or this Court, tending to show incompetency as would justify that the judgment of conviction be vacated and appellant be permitted to plead anew. Consequently, the only proper course is a determination at this time of appellant's present mental condition, as well as his mental condition on December 14, 1972 and February 16, 1973. *Lee* v. *State of Alabama*, 386 F.2d 97 (5th Cir. 1967), *cert. denied*, 395 U.S. 927 (1969); *Conner* v. *Wingo*, *supra*; *Barefield* v. *State of New Mexico*, 434 F.2d 307 (10th Cir. 1970), *cert. denied*, 401 U.S. 959 (1971); *Miranda* v. *United States*, *supra*; *Sullivan* v. *United States*, *supra*, at 551, n. 11; *Sensabaugh* v. *Beto*, 343 F. Supp. 563, 570-571 (N.D. Tex. 1972).

Since appellant has never been mentally examined, the competency determination by the District Court must begin with psychiatric examination. Section 4241 and the procedures under Section 4245 clearly provide the authority for such an approach. The pertinent legislative history states that Section 4245 is directed towards the situation of "any person who, during service of sentence, is certified by prison authorities to be of unsound mind and that such condition probably existed either at the time of commission of the offense or time of trial." 1949 U.S. Code Cong. Service, Volume 2, page 1929. See also *Johnson* v. *United States*, 344 F.2d 401 (5th Cir. 1965); *Johnson* v. *United States*, 433 F.2d 245 (5th Cir. 1970). Moreover, as demonstrated above, there is hardly any more material on the record in this case showing that appellant was incompetent when he pleaded guilty than there was in *United States* v. *Vowteras*, *supra*, 500 F.2d 1210, to indicate that Nestor Vowteras was unfit to stand trial.

Furthermore, the lack of significant objective evidence of incompetency in appellant's case stands in marked contrast to the amount of evidence of mental incompetency which was present with respect to the defendant in *United States* v. *Polisi, supra*, 514 F.2d 977. The remedy of this Court in *Polisi* was to remand to the District Court for a determination of competency at the time of trial. The Government is seeking nothing more here. To vacate appellant's conviction and to permit him to plead anew at this time would be to reward a prisoner whose case, on the record, is hardly substantial and who has failed to timely assert his claim. Such a result would be both illogical and unfair.

CONCLUSION

The order below should be vacated and the case remanded to the District Court for a determination of whether or not appellant was mentally competent to plead guilty on December 14, 1972, such determination to be preceded by a psychiatric examination pursuant to Title 18, United States Code, Section 4241, to determine appellant's present mental condition and his mental condition on December 14, 1972, the day he pleaded guilty, and February 16, 1973, the day he was sentenced.

Dated: Brooklyn, New York
December 17, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
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Of Counsel.[12]

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[12] The United States Attorney's Office wishes to acknowledge the assistance of Lawrence G. Green in the preparation of this brief. Mr. Green is a second year law student at New York University Law School.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 22nd day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Edward M. Chikofsky, Esq.
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, N.Y. 10022

Evelyn Cohen

Sworn to before me this
22nd day of Dec. 1975

Irene B. Cohen (Davidson)

IRENE B. COHEN (DAVIDSON)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977